DOCKETED

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 7 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DAVID HEDGECOCK
Plaintiff,
and
WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC.; CHANDLER'S PALOS VERDES SAND AND GRAVEL, a corporation; SANTA FE ENERGY RESOURCES, INC, a corporation; GARY HAMILTON; SUSAN HAMILTON,
Plaintiffs-Appellants,
v.
BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. L.P., a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Defendants-Appellees.

C.A. No. 93-16604
D.C. No. CV-92-05886-OWW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted February 16, 1995
San Francisco, California

Before: HUG, FARRIS, and POOLE, Circuit Judges.

We review de novo the dismissal of plaintiffs' antitrust claims, *Oscar v. University Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc), *cert. denied*, 113 S.Ct. 655 (1992), taking the factual allegations made by the plaintiff as true. *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1054 (9th Cir. 1994). We affirm.

I. State Action Immunity

The Sherman Act does not apply to anticompetitive restraints imposed by the States "as an act of government." *Parker v. Brown*, 317 U.S. 341, 352 (1943). Although "*Parker* immunity does not apply directly to local governments," *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991), local governments may nonetheless qualify for *Parker* immunity where they are acting with state authority under a "clearly expressed state policy" to displace competition with regulation. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). To qualify as "clearly articulated," the statute expressing state policy need not explicitly permit the displacement of competition. *City*

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

of Columbia, 499 U.S. at 373. It is enough that the allegedly anticompetitive conduct "is the 'foreseeable result' of what the statute authorizes." *Id.* (quoting *Town of Hallie*, 471 U.S. at 42).

A. Plaintiffs contend that *Parker's* threshold requirement of a clearly articulated state policy replacing competition with regulation is not satisfied. In *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), we concluded that California had "a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal control over water and water rights, so long as the municipality does not engage in waste or unreasonable use." *Id.* at 519. Plaintiffs would have the court distinguish *Kern-Tulare* on the ground that the case involved a city's "*sovereign* activities" rather than "private parties controlling a water district to create for themselves a monopoly on inexpensive water supplies which can be resold at a profit." The proposed distinction is without substance.

Plaintiffs' allegations of wrongdoing by private parties to control the district do not change the nature of the actions taken (and not taken) by the district. The refusal to sell "excess" water and the imposition of standby charges and ad valorem taxes are actions explicitly contemplated by the California Water Code. *See* Cal. Water Code §§ 31031, 31032.1, 35470, and 37200 *et seq.*; *Kern-Tulare*, 828 F.2d at 519 ("City's refusal to consent to the District's attempted transfer [was] contemplated by the legislature"). Plaintiffs' argument, focused on the anticompetitive *motive* of the district, is a reformulation of a proposed "conspiracy" exception already rejected by the Supreme Court. *See City of Columbia*, 499 U.S. at 379 ("we reaffirm our rejection of any interpretation of the Sherman Act that would allow

plaintiffs to look behind the actions of state sovereigns to base their claims on perceived conspiracies to restrain trade") (quotation omitted). Application of the state action immunity does not turn on a factual examination of whether the water district acted "for private gain" or "in the public interest." *City of Columbia*, 499 U.S. at 378. Under the California Water Code the district's refusal to sell allegedly excess water, and the concomitant increase in standby charges, is a foreseeable result of the state's delegation of these powers to local water districts. *See Kern-Tulare*, 828 F.2d at 519-520.

B. Next, plaintiffs contend that the district court erred in concluding that the water district was not required to demonstrate active state supervision to qualify for *Parker* immunity. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (in addition to policy being "clearly articulated," the policy must be "actively supervised by the State itself") (quotation omitted).

In *Town of Hallie*, the Supreme Court held that the active state supervision requirement "should not be imposed in cases in which the actor is a municipality." 471 U.S. at 46. Our decisions since *Town of Hallie*, have not required active state supervision of other limited purpose government entities similar to the water district. *See Ambulance Service of Reno, Inc. v. Nevada Ambulance Services, Inc.*, 819 F.2d 910 (9th Cir. 1987) (no active state supervision required for charitable corporation acting as instrument of municipality); *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833 (9th Cir. 1985) (no active state supervision required for utility district created by municipality), *cert. denied*, 474 U.S. 1103 (1986).

Plaintiffs contend that the conclusion was erroneously based on a factual finding in conflict with the allegations of the complaint. Although we must accept plaintiffs'

factual allegations, we need not "accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Plaintiffs contend that the district court disregarded their allegations that the district was acting as a "commercial actor" furthering "anticompetitive practices rather than legitimate government" and its decisions "were extraneous to the proper exercise of its powers as a public entity."

The allegations of illegitimate motive are not relevant to the application of *Parker* immunity. *See City of Columbia*, 499 U.S. at 377-79. Having acknowledged that the district is a "public entity" their argument that the district has improperly abandoned the public interest is not a basis to impose the active state supervision requirement.

C. Finally, plaintiffs contend that because the district was acting as a "commercial participant" in an antitrust conspiracy with Blackwell, Paramount and other unnamed coconspirators, it is not entitled to *Parker* immunity.

In *City of Columbia*, the Supreme Court referenced a "possible market participant exception" without deciding there was one. 499 U.S. at 379. Likewise, the Eleventh Circuit's decision in *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931 (Fed Cir. 1993), *cert. denied*, 114 S.Ct. 1126 (1994), did "not decide whether the [University of California's] licensing activities establish a market participant exception to State Action immunity." *Id.* at 949. While a commercial participant exception to *Parker* might be appropriate in circumstances where an arm of the state enters a market in competition with private actors, *see, e.g., Union Pac. R.R. v. United States*, 313 U.S. 450 (1941), such is not the case here. Plaintiffs contend that the district acted as a commercial

participant in its "decisions regarding the purchase, sale, price, marketing, distribution and allocation of water." Plaintiffs are not in competition with the district, rather they feel the economic effect of the district's decisions concerning the refusal to sell allegedly excess water to other districts. These effects are a direct result of decisions explicitly delegated to water districts by the state pursuant to a scheme of water regulation. *See Kern-Tulare*, 828 F.2d at 520.

II. *Noerr-Pennington* Immunity for Blackwell and Paramount

As a corollary to *Parker*, the *Noerr-Pennington*[1] doctrine exempts from federal antitrust laws "conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia*, 499 U.S. at 379-80.

Plaintiffs rely primarily on *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988) for the proposition that Blackwell's and Paramount's efforts do not qualify for *Noerr-Pennington* immunity because "the lobbied government official is [not] politically independent and financially disinterested."

Plaintiffs' reliance on *Allied Tube* is misplaced. Plaintiffs allege harm that stemmed directly from decisions of the water district not to sell water and to impose standby charges. Unlike the plaintiffs in *Allied Tube*, plaintiffs have not alleged "that [they] sustained injuries from anything other than the actions of municipal authorities." *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir.), *cert. denied*, 115 S.Ct.

---

[1] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

66 (1994). If accepted, plaintiffs' theory would require the district court to investigate the considerations motivating the water district's decision not to sell excess water. Such "deconstructing" of the water district's decision making process would "run[] afoul of the principles guiding the *Parker* and *Noerr* decisions." *Id.* at 300.

Plaintiffs' allegations do make out a case that the defendant landowners acted in their own self interest in bringing about water district decisions favorable to them and detrimental to the plaintiffs. However, it is beyond the scope of the antitrust laws "to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." *City of Columbia*, 499 U.S. at 383.

AFFIRMED.